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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1366

ANGELO MARINO, THOMAS BASALARI and
ADAM NICHOLAS,

Petitioners,

v.

THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Angelo Marino, Thomas Basalari and Adam Nicholas petition for a writ of certiorari to review judgments of the Appellate Division of the Supreme Court of New York, First Judicial Department, which affirmed judgments of the Supreme Court of New York, County of Bronx, convicting them of the crime of official misconduct, New York Penal Law § 195.00, 39 McKinney's N. Y. Cons. Laws Ann.

OPINION BELOW

The Appellate Division of the Supreme Court affirmed the convictions by order without opinion.

JURISDICTION

The judgments sought to be reviewed (Appendix A hereto) were dated and entered December 2, 1971.

Under §§ 460.10.5(a) and 460.20 of the New York Criminal Procedure Law, 11A McKinney's N. Y. Cons. Laws Ann., the judgments of the Appellate Division were reviewable by the Court of Appeals of New York on discretionary grant of an application for leave to appeal filed within 30 days. Such an application on behalf of the petitioners herein was filed with the Court of Appeals of New York on December 28, 1971. The application was denied on January 26, 1972 (Appendix B hereto).

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioners' privilege against self-incrimination was violated by admitting as evidence of guilt their failure to comply with police department regulations requiring police officers to disclose information received by them concerning criminal activities and to record their official activities.

2. Whether petitioners were convicted in violation of procedural due process and the Sixth Amendment because of the vague and uninformative nature of the accusation against them.

STATEMENT OF THE CASE

After trial by jury, petitioners were convicted in the Supreme Court of New York, Bronx County, on the seventh count of a seven-count indictment. That count, laid under § 195.00 of the Penal Law of New York,[1] read as follows:

> "SEVENTH COUNT:
>
> "AND THE GRAND JURY AFORESAID, by this indictment, further accuse said defendants of the Crime of OFFICIAL MISCONDUCT, A MISDEMEANOR, committed as follows:
>
> "The said defendants, acting in concert with each other, and another person, in the County of Bronx, on or about and between the 14th day of November, 1969, and the 24th day of November, 1969, while employed as public servants, to wit, detectives in the Police Department of the City of New York, with intent to obtain a benefit therefrom, to wit, approximately $1,300.00 United States Currency, a quantity of narcotic drugs, a sawed off shot gun, and other personal property from Barbara Kimble and John Garland, unlawfully refrained from performing a duty which was imposed upon them by law and which was clearly inherent in the nature of their offices."

Four other counts of the indictment were dismissed at the close of the evidence. Of the three counts that went to the jury, petitioners were acquitted on two felony charges, alleging, respectively, larceny by extortion and grand larceny of the property described in the seventh count.

At the trial, the evidence for both sides showed that petitioners, detectives of the New York Police Department,

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[1] "195.00 Official Misconduct. A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit: . . . 2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office. Official misconduct is a Class A misdemeanor."

were admitted into the apartment of Barbara Kimble and John Garland. According to petitioners, they had gone to the apartment after receiving a report from an informant that its occupants were selling narcotics and receiving stolen goods there.

Kimble and Garland testified that petitioners ransacked the apartment, found and confiscated $1300 in cash, a supply of narcotics, a shotgun and other personal property, and then departed without making an arrest. Petitioners testified that they searched the apartment with Kimble's consent, found no contraband or other incriminating evidence, took nothing and left.

The evidence also showed that petitioners had long records of exemplary service as police officers and enjoyed good reputations. Kimble and Garland, on the other hand, by their own admissions were heroin addicts, trafficked extensively in drugs, and were living together without benefit of clergy.

The guilty verdict on the seventh count necessarily indicates that the jury credited the testimony of Kimble and Garland over that of the petitioners. On the other hand, the acquittals on the two larceny counts necessarily indicates a contrary jury resolution of the conflicting testimony.

The case against petitioners was significantly buttressed by testimony of a police captain, Hanley, introduced by the State in its direct case. Hanley testified that Police Department regulations required police to file reports (UF 61 Crime Reports) of information received by them concerning alleged criminal activity. He also testified that departmental regulations required detectives to record their official activities in memorandum books. He testified that he had searched the records and inspected the petitioners' memorandum books and had found no report or indication relating to petitioners' visit to the Kimble-Garland apartment.

Each appellant was sentenced to imprisonment for one year. The Appellate Division affirmed the convictions. The Court of Appeals denied petitioners' application for leave to appeal.

The Raising of the Federal Questions

1. At the trial, petitioners objected to the admission of testimony of Captain Hanley regarding their noncompliance with the departmental disclosure regulations (Trial Tr. 874-876, 879, 881). In their brief in the Appellate Division of the Supreme Court of New York, petitioners' Point III read: "The Appellants' Right of Silence Under the Fifth and Fourteenth Amendments to the Federal Constitution Were Violated" (Brief, p. 50). The text under that heading complained (pp. 50-51) that Captain Hanley's testimony was admitted in violation of petitioners' privilege against self-incrimination. The point was necessarily decided against petitioners by the orders of the Appellate Division affirming their convictions without opinion (Appendix A hereto).

2. The following passages from appellants' brief in the Appellate Division show the raising of the federal question as to the vagueness of the Seventh Count of the indictment:

> "The seventh count of the indictment nowhere alleged just what duty or duties were involved and which the defendants failed to perform. In charging the jury as to the seventh count, the court nowhere explained to the jury just what duties were ignored by the defendants nor did the court in any way define such duties." (P. 39.)
>
> "By not explaining the intentment of the statute and its meaning, the Court in effect allowed the statute to be considered by the jury as a vague, abstract matter and actually allowed the jury to determine what the law is. This would therefore convert the statute from a definite enactment to a vague enactment; see Giaccio v. Pennsylvania, 382 U.S. 399. In other words, the charge to the jury in regard to

the law of this case left the jury free to decide the issue without any legally fixed standards." (P. 47.)

"That the indictment in regard to the seventh count violated the Sixth Amendment to the federal constitution that requires that an accused in a criminal case be informed of the nature and cause of the accusation. See also Russell v. U.S., 369 U.S. 749; U.S. v. Lamont, 18 FRD 27, 31, aff'd 236 F (2) 812." (P. 48.)

This point was necessarily decided against petitioners by the orders of the Appellate Division affirming their convictions without opinion (Appendix A hereto).

REASONS FOR ALLOWING THE WRIT

1. The Self Incrimination Question

The admission of the testimony of Captain Hanley raises an important question concerning the application of the privilege against self-incrimination.

Where statutes or regulations require individuals to disclose information to the government, substantial questions relating to the privilege against self-incrimination inevitably arise. As was recently stated in *California v. Byers*, 402 U.S. 424, 427 (1971):

> "Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination are likely to give rise to serious questions."

In *Byers* and other cases in this Court, the "incriminating potential" of disclosure requirements was raised by individuals who were prosecuted for failing to comply with the requirements. The question, in each instance, was whether the fact that the disclosure would have been self-

incriminating was a defense to the prosecution. In *Byers* and *United States v. Sullivan*, 274 U.S. 259 (1927), a disclosure requirement prevailed over the claim of self-incrimination on the ground that the requirement was addressed to the public at large and neutral in nature. In *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); and *Haynes v. United States*, 390 U.S. 85 (1968), the claim of privilege prevailed on the ground that the disclosure requirement was addressed to a " 'highly selective group inherently suspect of criminal activities' and the privilege was applied only 'in an area permeated with criminal statutes' – not in 'an essentially noncriminal and regulatory area of inquiry.' " *California v. Byers*, *supra*, at 430, quoting from *Albertson v. SACB*, 382 U.S. 70, 79 (1965), and *Marchetti* at 47.

In the instant case, petitioners were convicted of a crime labelled "official misconduct." As we later see, however, it is impossible to tell whether the alleged misconduct consisted of the failure to make the disclosures required by the police regulations or of some other default. In either situation a substantial question is presented.

If we assume that the accusation was noncompliance with the regulations, we have a situation in between *Byers* and *Sullivan* on the one hand and *Marchetti* and *Albertson* on the other. Here the disclosure requirements were addressed not to the general public, as in *Byers*, but to a discrete class, police officers, as in *Marchetti*. It would be an overstatement to say that this class is "inherently suspect of criminal activities." On the other hand, the regulation operates in a criminal area of inquiry, and it is fair to say that it is, at least in part, a safeguard against corrupt activities by the police.

If we assume that the indictment alleges nonperformance of some duty other than reporting and recording (e.g., a failure to arrest Kimble and Garland), we have a novel situation. The privilege issue arises not, as in the preceding

cases, in a prosecution for failure to make required disclosures. Instead, the issue is whether such a failure may be admitted as evidence that an accused committed a crime which presumably would have been disclosed had he made the disclosures.

On principle, such an evidentiary use of failures to make disclosures is, we submit, a violation of the privilege.

2. The Vagueness Question

The Sixth Amendment and due process require that a criminal accusation contain not only "the general description of an offense," but also "such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487 (1888). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). See also *Russell v. United States*, 369 U.S. 749 (1962); *United States v. Cruikshank*, 2 Otto (92 U.S.) 542, 558 (1876).

The accusation in this case alleged that petitioners "with intent to obtain a benefit therefrom . . . unlawfully refrained from performing a duty which was imposed upon them by law and which was clearly inherent in the nature of their offices." The "benefit" was specifically described. But nothing in the indictment (or the court's instructions to the jury) identified the "duty" which petitioners allegedly refrained from performing. For all one can tell, in the circumstances of this case, the alleged breach of duty may have been the failure to report and record as required by the departmental regulations, or a failure to turn over to

the police property clerk the seized narcotics, or a failure to arrest Kimble and Garland.[2]

Accordingly, petitioners were denied their Sixth Amendment right, incorporated in the due process clause of the Fourteenth Amendment, "to be informed of the nature and cause of the accusation" against them. And since it is impossible to tell what view the uninstructed jury took as to the meaning of the accusation, petitioners were convicted, in contravention of due process, of a charge on which they were never tried and which was never made. See *Cole v. Arkansas, supra,* at 201; *DeJonge v. Oregon,* 299 U.S. 353, 362 (1937).

CONCLUSION

Certiorari should be granted and the judgments below reversed.

Respectfully submitted,

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[2] Of these three possibilities, the first (failure to report and record) was suggested by the trial court for the first time at a post-trial hearing on a motion to arrest judgment. (5-9, Tr. of Feb. 5, 1971.) On the other hand, the State's brief in the appeal stated (p. 31): "It is self-evident that the breach of duty herein was the failure to arrest."

APPENDIX A

The Judgments Below

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 2, 1971.

Present--Hon. Harold A. Stevens, Presiding Justice
Louis J. Capozzoli
Emilio Munez
Theodore R. Kupferman
Francis T. Murphy, Jr., Justices

The People of the State of New York, *Respondent,*

-against-

Angelo Marino, *Defendant-Appellant.*

No. 4448

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Sandifer, J.), rendered on February 5, 1971, convicting defendant of the crime of official misconduct (Penal Law § 195.00), and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Ronald D. Degon of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment ment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: HYMAN W. GAMSO,
Clerk

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 2, 1971.

Present—Hon. Harold A. Stevens, Presiding Justice
Louis J. Capozzoli
Emilio Munez
Theodore R. Kupferman
Francis T. Murphy, Jr., Justice

The People of the State of New York, *Respondent,*	)	
— against —	)	**No. 4449**
Thomas Basalari, *Defendant-Appellant.*	)	

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Sandifer, J.), rendered on February 5, 1971, convicting defendant of the crime of official misconduct (Penal Law § 195.00), and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Ronald D. Degon of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: HYMAN W. GAMSO,
Clerk

a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 2, 1971.

Present—Hon. Harold A. Stevens, Presiding Justice
Louis J. Capozzoli
Emilio Munez
Theodore R. Kupferman
Francis T. Murphy, Jr., Justices

The People of the State of New York,
Respondent,

—against—

Adam Nicholas,
Defendant-Appellant.

No. 4450

ORDER OF AFFIRMANCE ON APPEAL FROM JUDGMENT

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Sandifer, J.), rendered on February 5, 1971, convicting defendant of the crime of official misconduct (Penal Law § 195.00), and said appeal having been argued by Mr. Arnold E. Wallach of counsel for the appellant, and by Mr. Ronald D. Degon of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER: HYMAN W. GAMSO
Clerk.

APPENDIX B

Order of Court of Appeals Denying Leave to Appeal

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. CHARLES D. BREITEL, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ANGELO MARINO, THOMAS BASALARI, and ADAM NICHOLAS,

Defendants-Appellants.

CERTIFICATE DENYING LEAVE

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York, New York
January 26, 1972

/s/ CHARLES D. BREITEL
Charles D. Breitel
Associate Judge

*Arnold E. Wallach, Esq.
299 Broadway
New York, New York 10007

Hon. Burton B. Roberts
District Attorney, Bronx Co.
851 Grand Concourse
Bronx, New York

Hon. Raymond J. Cannon, Clerk
Court of Appeals

*Briefs returned at office

*Description of Order:

2-5-71 Sup. Ct., Bronx Co., affirmed App. Div. 1st 12-3-71